

COMPLIANCE BOARD OPINION 92-5

December 22, 1992

Ms. Jennifer Stanley

The Open Meetings Compliance Board has considered the complaint dated October 1, 1992 that you filed alleging violations of the Open Meetings Act by the Oxford Town Commissioners. The Commissioners of Oxford filed a timely response in a form of a letter dated November 10, 1992 from their attorney, David R. Thompson, Esquire.

I

Litigation-Related Closed Session

Your complaint has three aspects. The first has to do with the closing of a portion of the meeting on September 8, 1992, for a discussion related to litigation. Your complaint regarding this aspect of the meeting is as follows:

At the September 8th meeting of the Commissioners of Oxford there was a closed meeting "regarding litigation." This closed session was announced after the Commissioners meeting was underway. No notice of a closed session had been given in the posted agenda for the meeting. The presiding officer did not "conduct a recorded vote on the closing of the session." The Commissioners announced the evening's business meeting had come to an end and they would now go into "closed session." When asked further to describe the reason for the closed session the Town Attorney would not convey any further information than to say that he was giving "legal advice." Further, the section of the act under which the closing of the session was authorized was not cited.

Mr. Thompson's letter indicates, and the minutes of the executive session that he provided confirm, that the closed session on September 8 was confined to a discussion of pending litigation related to a particular subdivision and its impact on a decision to be made concerning the subdivision. Mr. Thompson provided legal advice about the handling of an application for the subdivision.

In the opinion of the Compliance Board, the Open Meetings Act permitted this discussion to be closed to the public. Under §10-508(a)(7), a public body may close a session to "consult with counsel to obtain legal advice." Further, under §10-508(a)(8), a public body may meet in closed session "to consult with staff, consultants, or other individuals about pending or potential litigation."

The Open Meetings Act also imposes certain procedural prerequisites to the holding of a closed session. In this respect, the Oxford Town Commissioners did not comply with the Act. Specifically, §10-508(d)(2)(ii) requires the presiding officer to "make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed." This statement is to be available at the time the public body makes its decision to go into closed session; an oral discussion that will later be recorded in minutes is not sufficient. The Commissioners did not comply with this requirement at its September 8 meeting, as Mr. Thompson's letter acknowledges.

The Compliance Board also understands from Mr. Thompson's letter that the Commissioners have not been complying with §10-509(c)(2), which requires the minutes of an open session following a closed session include:

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the session;
- (iii) a citation of the authority under this subtitle for closing the session; and
- (iv) a listing of the topics of discussion, persons present, and each action taken during the session.

Mr. Thompson's letter indicates that the Commissioners have taken steps to remedy these aspects of procedural noncompliance.

In the course of his letter on behalf of the Commissioners, Mr. Thompson expresses the view that written materials about a session closed for a discussion of litigation need not disclose information encompassed by the attorney-client privilege. The Compliance Board agrees. The level of detail in the written statement required prior to a closed session and in the minutes of the ensuing open session may preserve the confidence of information that led to the session's being closed in the first place. See Office of the Maryland Attorney General, Open Meetings Act Manual 19 (1992).

II

"Bills Payable"

Your second concern has to do with the application of the Open Meetings Act to a discussion of "bills payable": "Is the public excluded from witnessing the discussion of pending bills payable?"

This aspect of your complaint appears raise no present issue. Mr. Thompson asserts that the process by which the Commissioners approve the payment of bills occurs in open session: "'[B]ills payable' have always been processed in public session.

III

Decisionmaking Process on Affordable Housing

Finally, you express concern about a decision by the Commissioners, apparently at the meeting of September 22, "to accept the Financial Plans of the Affordable Housing Commission." Your complaint in this regard is as follows:

There was no notice of the pending motion in the posted agenda. The Commissioners never stated or read the motion in its entirety before conducting a vote. There was neither debate nor dialogue on the topic. Their actions implied that they had made up their minds before coming to the meeting and were not interested in having the public understand what they had voted and why they had voted in the affirmative. The minutes of the meeting record the motion but nowhere does the motion state the financial commitment of \$1.5 million which represents three times the annual general fund revenue.

This aspect of your complaint raises issues that are largely outside the scope of the Open Meetings Act. Although the Act requires that notice of a meeting be provided, it does not require that particular agenda items be set out in the notice. A notice is to indicate "the date, time, and place of the session," and, "if appropriate, ... a statement that a part or all of a meeting may be conducted in closed session." §10-506(b). A public body is free, of course, to provide other information in a notice of a meeting, but it is not required by the Act to do so.

Nor does the Act address the manner in which a public body makes decisions in an open session. The Compliance Board encourages public bodies to conduct their discussions in such a way that observers at the meeting will understand the nature of the question and the positions of the participants. But these are matters that are left to the discretion of public body members; they are beyond the scope of the Open Meetings Act.

OPEN MEETINGS COMPLIANCE BOARD

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